United Nations A/CN.9/508

General Assembly

Distr.: General
12 April 2002

Original: English

United Nations Commission on International Trade Law
Thirty-fifth session
New York, 17-28 June 2002

Report of the Working Group on Arbitration on the work of its thirty-sixth session (New York, 4-8 March 2002)

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* The document's late submission is due to the Working Group's decision to adopt the final portion of the report (paras. 77-94) by electronic mail exchange after the close of the session.

V.02-53386 (E)
02-39891

Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (ibid., para . 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., para . 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (ibid., para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (ibid., para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the

requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.[7] At its thirty-fifth session (Vienna, 19-30 November 2001), the Working Group approved the final version of the draft provisions in the form of a draft model law on international commercial conciliation. The report of that session is contained in document A/CN.9/506. The Working Group noted that the draft model law, together with the draft guide to enactment and use, would be circulated to member States and observers for comment, and presented to the Commission for review and adoption at its thirty-fifth session.

6. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration (see A/CN.9/WG.II/WP.113, paras. 13 and 14) and a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (ibid., para. 16). Consistent with a view expressed in the context of the thirty-fourth session of the Working Group (A/CN.9/487, para. 30), concern was expressed as to whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules available in written form could satisfy the written form requirement. It was stated that such a reference should not be taken as satisfying the form requirement since the written text being referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration (i.e. a text that would most often exist prior to the agreement and result from the action of persons that were not parties to the actual agreement to arbitrate). It was pointed out that, in most practical circumstances, it was the agreement of the parties to arbitrate that should be required to be made in a form that was apt to facilitate subsequent evidence of the intent of the parties. In response to that concern, it was generally felt that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable right provision of article VII of the New York Convention.

7. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration and the text of paragraph 1 (a) (i) of a draft new article prepared by the Secretariat for addition to that Model Law (A/CN.9/WG.II/WP.113, para. 18). The Working Group was requested to continue its work on the basis of revised draft provisions to be prepared by the Secretariat.

8. The Working Group on Arbitration was composed of all States members of the Commission. The session was attended by the following States members of the

Working Group: Austria, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Romania, Russian Federation, Singapore, Spain, Sweden, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, and United States of America.

9. The session was attended by observers from the following States: Argentina, Australia, Bangladesh, Belarus, Croatia, Cyprus, Czech Republic, Egypt, Finland, Iraq, Ireland, Malta, Nigeria, Peru, Philippines, Poland, Portugal, Republic of Korea, Slovakia, Switzerland, Turkey and Venezuela.

10. The session was attended by observers from the following international organizations: Central American Court of Justice, Hague Conference on Private International Law, International Cotton Advisory Committee (ICAC), NAFTA Article 2022 Advisory Committee, Permanent Court of Arbitration, American Bar Association, *Comité Maritime International*, Latin American Banking Federation, Global Centre for Dispute Resolution Research, Inter-American Commercial Arbitration Commission (IACAC), International Chamber of Commerce (ICC), International Law Institute, Lagos Regional Centre for International Commercial Arbitration, the London Court of International Arbitration (LCIA), Queen Mary (University of London) School of International Arbitration, *Union Internationale des Avocats*, The Chartered Institute of Arbitrators and U.S.-Mexico Conflict Resolution Centre.

11. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Mr. Koichi MIKI (Japan).

12. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.117) and two notes by the Secretariat discussing the issues of the written form for the arbitration agreement (A/CN.9/WG.II/WP.118), and interim measures of protection (A/CN.9/WG.II/WP.119).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on written form for arbitration agreements and on interim measures of protection.
4. Other business.
5. Adoption of the report.

I. Deliberations and decisions

14. The Working Group discussed agenda item 3 on the basis of the documents prepared by the Secretariat (A/CN.9/WG.II/WP.118 and 119). The deliberations and conclusions of the Working Group with respect to that item are reflected below in Chapters II and III. The Secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for continuation of the discussion at a later stage.

15. With regard to the requirement of written form for the arbitration agreement, the Working Group considered the draft model legislative provision revising article 7(2) of the Model Law on Arbitration (A/CN.9/WG.II/WP.118, para. 9). The Secretariat was requested to prepare a revised draft provision, based on the discussion in the Working Group, for consideration at a future session. The Working Group also discussed a draft interpretative instrument regarding article II(2) of the New York Convention (ibid., paras. 25-26). The Working Group acknowledged that it could not, at the present stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. In the meantime, the Working Group was agreed that it would be useful to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a "friendly bridge" between the new provisions and the New York Convention, pending a final decision by the Working Group on how best to deal with the application of article II(2) of the Convention.

16. With regard to the issues of interim measures of protection, the Working Group considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119, para. 74). The Secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. Due to lack of time, a revised draft of a new article prepared by the Secretariat for addition to the Model Law regarding the issue of enforcement of interim measures of protection ordered by an arbitral tribunal (ibid., para. 83) was not considered by the Working Group.

17. It was noted that, subject to a decision to be made by the Commission at its forthcoming session, the thirty-fifth session of the Working Group was scheduled to be held from 7 to 11 October 2002 at Vienna.

II. Requirement of written form for the arbitration agreement

A. Model legislative provision on written form for the arbitration agreement

18. The draft model provision was as follows:

"Article 7. Definition and form of arbitration agreement

"(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

"(2) The arbitration agreement shall be in writing. 'Writing' includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference.

"[(3) 'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.]

"(4) For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are in writing, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

"(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

"(6) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

"[(7) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.]"

Paragraph (1)

19. It was pointed out that paragraph (1), which reproduced the unchanged text of paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Law on Arbitration") encompassed, in its second sentence, two types of arbitration agreements: an agreement in the form of an arbitration clause in a contract or as a separate agreement. The provision itself was not felt to create controversy. Nevertheless, it was suggested that the Working Group might need to review and, if required, revise the current formulation of the second sentence so as to align it with the substance of paragraph (4). It was said, in particular, that paragraph (4) implicitly made a distinction between an arbitration agreement, on the one hand, and the terms and conditions of the arbitration or its governing rules, on the other hand. Paragraph (4) thus appeared to cover situations that did not fall strictly under either of the types of arbitration agreement mentioned in paragraph (1).

20. The Working Group approved the substance of paragraph (1) and, having taken note of the comments made thereon, decided to revert to them after it had considered paragraph (4).

Paragraph (2)

21. The Working Group considered various comments and proposals, of both substance and form, in connection with paragraph (2). The substantive comments raised by the provision were essentially concerned with the relationship between the notions of "record" and "data message" and the interplay among paragraphs (2), (3) and (4). Drafting comments were essentially concerned with refining the provision to make it unambiguously clear that arbitration agreements could be validly concluded by means other than in the form of paper-based documents, for example, by electronic communications.

22. The Working Group noted that the notion of "record", as used in article 7, paragraph 2 of the UNCITRAL Model Law on Arbitration, was not specifically concerned with facilitating the use of electronic means of communication. The text of draft paragraph (2) had therefore been drafted on the basis of provisions of two more recent UNCITRAL texts: article 7(2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, which provides that "[a]n undertaking may be issued in any form which preserves a complete record of the text of the undertaking [...]"; and article 6(1) of the UNCITRAL Model Law on Electronic Commerce, which provides that "[w]here the

law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference".

23. The Working Group then considered at length the conceptual distinction between "record" and "data message" and the desirability of combining them in a single provision. The Working Group agreed that the notion of "record" as used in article 7, paragraph (2) of the UNCITRAL Model Law on Arbitration should be retained without being limited to "tangible" records. Some of the speakers were of the view that the term "record" alone might suffice, since it was broad enough to cover "data messages", particularly if it was linked with the definition of a form which "is otherwise accessible so as to be usable for subsequent reference". Other speakers, however, expressed the view that the term "record" might raise issues of translation in the various official languages and create difficulties in those legal systems where such notions as "record" or "business record" were not heavily relied upon in commercial law. The prevailing view was that it was important to combine the traditional notion of "record" with the more innovative notion of "data message" so as to make it clear that records other than traditional paper documents were included among the acceptable forms of recording an arbitration agreement.

24. The qualifying phrase "accessible so as to be usable for subsequent reference", was felt by some speakers to be unnecessary. The prevailing view was that it was essential in the context of paragraph (2), since it set forth the conditions whereby any message, including data messages, might meet writing requirements established by the law.

25. Having agreed to the need for making reference in paragraph (2) to both "record" and of "data messages", the Working Group proceeded to consider various drafting proposals. One proposal was that the second sentence of paragraph (2) should be redrafted along the following lines: "'writing' or 'in writing' includes any form being recorded by any means [, so as to be usable for subsequent reference]". The Working Group eventually agreed to reformulate the second sentence of paragraph (2) along the following lines: "'Writing' means any form, including without limitation a data message, that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference."

Paragraph (3)

26. The Working Group considered that a definition of "data message" was needed since that expression was used in paragraph (2) and decided to retain the provision without the square brackets.

Paragraphs (4) and (6)

27. There was general agreement that one of the main purposes of a revision of article 7 of the UNCITRAL Model Law on Arbitration should be to recognize the formal validity of arbitration agreements that came into existence in certain factual situations as to which courts or commentators had differing views on whether the form requirement set forth in the current text of article 7, paragraph (2), of the Model Law was met. Among such factual situations, the Working Group focused its attention on the following: (a) the case where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form; (b) contracts concluded by performance or by conduct (for example a sale of goods under article 18 of the United Nations Convention on Contracts for the International Sale of Goods), with reference to a standard form containing an arbitration clause, such as documents established by the Grain and Food Trade Association (GAFTA); (c) contracts concluded orally but subsequently confirmed in writing or otherwise linked to a written document containing an arbitration clause, such as the general sale or purchase conditions established unilaterally by a party and communicated to the other; and (d) purely oral contracts. As a matter of general policy, it was widely agreed that in cases (a) to (c) the

reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement. It was also agreed that a purely oral arbitration agreement should not be regarded as formally valid under the Model Law. In that context, it was observed by a number of delegations that the mere reference in an oral contract to a set of arbitration rules should not be regarded as sufficient to meet the written form requirement, since a set of procedural rules should not be regarded, in and of itself, as equivalent to a contractual document containing an arbitration clause. However, some delegations expressed the view that such a reference in an oral contract to a set of arbitration rules should be accepted as expressing sufficiently the existence and contents of the arbitration agreement, particularly when the set of rules includes a model arbitration clause.

28. Doubts were expressed as to whether draft paragraph (4) adequately expressed the above-mentioned general policy. It was pointed out that stating that "the writing requirement [...] is met if the arbitration clause [...] [is] in writing" was tautological. In addition, a concern was expressed that the reference to "the arbitration terms and conditions" was unclear and created the risk of an inconsistency between draft paragraph (4) and draft paragraph (1). As to the reference to "any arbitration rules referred to by the arbitration agreement", a further concern was that it did not take into account the need for the arbitration agreement to be sufficiently manifest to minimize the risk that a party would be drawn into arbitration against its will. Doubts were also expressed as to whether paragraph (4) could reasonably be read as consistent with the provisions of the New York Convention.

29. With a view to alleviating the above-mentioned concerns, a proposal was made that paragraph (4) should be redrafted along the following lines: "For the avoidance of doubt, the writing requirement in paragraph (2) is met if: (a) the arbitration agreement, taken per se, is made in writing; or (b) a valid contract has been concluded between the parties and such contract includes within its contents, whether directly or by reference, a clause in writing providing for arbitration". Another proposal was that paragraph (4) should be redrafted as follows: "For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause is in writing, notwithstanding that the contract has been concluded orally, by conduct or by other means not in writing".

30. However, it was generally felt that, instead of draft paragraph (4), draft paragraph (6) should be used to support the above-mentioned policy. A note of caution was struck about revising the text of draft paragraph (6), which was already contained in article 7 of the Model Law, and was generally interpreted as covering the situation where the underlying contract did not mention arbitration but incorporated by reference another document, such as a standard form, which contained an arbitration clause. It was stated that the last sentence of paragraph (2) of article 7 of the UNCITRAL Model Law on Arbitration, on which paragraph (6) was based, was generally not interpreted as interfering with the writing requirement established in respect of the arbitration agreement.

31. After discussion, the Working Group agreed that paragraph (4) should be deleted and paragraph (6) should be redrafted along the following lines: "For the avoidance of doubt, the reference in a contract or a separate arbitration agreement to a writing containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing". It was also agreed that the guide to enactment of the model legislative provision should contain detailed explanations regarding the meaning and recommended interpretation of the revised text of paragraph (6).

Paragraph (5)

32. The suggestion was made that the draft paragraph should be deleted for a number of reasons. Firstly, the reference to an "exchange of statements of claim and defence" was seen to be vague and potentially misleading since, for example, reference to the existence of an arbitration agreement was often made at an earlier stage of arbitral proceedings, such as in a notice of arbitration within the meaning of article 3 of the UNCITRAL Arbitration Rules. Secondly, the subject matter addressed in the draft paragraph was said to be already covered by articles 4 and 16(2) of the UNCITRAL Model Law on Arbitration, so that no further provision was needed. Lastly, it was suggested that the draft paragraph was excessively narrow in that it dealt only with the case where a party specifically alleged the existence of an arbitration agreement and did not cover frequent situations where the party merely stated its claim to the arbitral tribunal without an express allegation that an arbitration agreement existed.

33. In support to the deletion of the draft paragraph it was also stated that the subject matter covered therein was essentially concerned with the waiver of a party's right to object to the jurisdiction of the arbitral tribunal, rather than with the formation of the arbitration agreement itself. As such, the substance of the draft paragraph was not appropriately placed in draft article 7. In any event, if the provision was to be retained, it was suggested that it should at least be amended along the following lines: "It is deemed that the parties have concluded a valid arbitration agreement if no objection to the jurisdiction of the arbitral tribunal is raised in due time".

34. The prevailing view, however, was in favour of retaining the draft paragraph. It was said that article 4 of the UNCITRAL Model Law on Arbitration dealt with a different situation from the one contemplated in the draft paragraph, which was said to constitute a useful addition to the Model Law. Article 4 of the Model Law did not deal with the existence of the arbitration agreement, but only with the waiver of a party's right to raise objections based on alleged non-compliance with provisions of the Law from which the parties may derogate or any requirement under the arbitration agreement if that party proceeded with the arbitration without stating its objection to such non-compliance without undue delay, or, if a time-limit was provided therefore, within such period of time. Draft paragraph (5) was needed, since the narrow scope of article 4 of the Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence thereof, by virtue of the exchange of statements of claim and defense.

35. It was also pointed out that the draft paragraph had a precedent in the application of article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Washington Convention"), which, in practice, had been construed to the effect that the notice of arbitration submitted by a foreign investor to the International Centre for the Settlement of Investment Disputes under certain circumstances dispensed with the need for a special arbitration agreement.

Paragraph (7)

36. It was recalled that paragraph (7) had been placed between square brackets until further discussion had taken place as to whether the substance of the provision should be included in article 7 or in an amendment to article 35. It was also recalled that article 35(2) of the Model Law mirrored article IV of the New York Convention. Any deviation from the existing text of article 35 would therefore require additional work towards amending the New York Convention or providing means to secure a uniform yet innovative interpretation of article IV of the New York Convention.

37. The view was expressed that the issue dealt with under draft paragraph (7) would more appropriately be addressed under a revised version of both article 35 of the Model

Law and article IV of the New York Convention. It was stated that the governing principle regarding that issue was that the party seeking enforcement of an award should bear the burden of proof regarding the existence and contents of the arbitration agreement. That principle would remain unchanged even if the formal requirement regarding the submission of the arbitration agreement as a written original document was abandoned. It was thus suggested that in paragraph (2) of article 35 every reference to the arbitration agreement should be deleted. Article IV of the New York Convention should be modified accordingly.

38. Support was expressed in favour of the above-mentioned principle. In addition, it was pointed out that the suggested redraft of article 35 would present the advantage of avoiding the need for the party seeking enforcement to produce the "arbitration terms and conditions", or any other document that might encourage courts to discuss the existence of the arbitration agreement in the absence of a challenge to the tribunal's findings, which could needlessly delay enforcement.

39. However, the proposed redraft of article 35 was objected to on the grounds that amending that article could result in the need to revise article IV of the New York Convention, thereby pre-empting the result of the future discussion regarding the advisability of entering into the preparation of a protocol to the New York Convention (see below, paras. 42-50). As an alternative to the above-suggested redraft of article 35 of the Model Law, it was proposed that paragraph (7) should be deleted and a sentence should be added at the end of paragraph (6) along the following lines: "In such a case, the writing containing the arbitration clause constitutes the arbitration agreement for purposes of article 35". It was stated by its proponents that such a sentence was consistent with the New York Convention. After discussion, that proposal was adopted by the Working Group.

B. Interpretative instrument regarding Article II (2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

40. It was recalled that the Working Group at its thirty-fourth session discussed a preliminary draft interpretative instrument relating to article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter, the "New York Convention") and requested the Secretariat to prepare a revised draft of the instrument, taking into account the discussion in the Working Group, for consideration at a future session (A/CN.9/487, para. 18).

41. At the current session, the Working Group proceeded with its consideration of the matter on the basis of the text of the draft declaration, as adopted by the Working Group at its thirty-fourth session (A/CN.9/487, para. 63). That text was as follows:

> "*Declaration regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*
>
> "*The United Nations Commission on international Trade Law*,
>
> "[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,
>
> "[2] *Conscious* of the fact that the Commission comprises the principal economic and legal systems of the world, and developed and developing countries,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, *inter alia*, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, *inter alia*, that the Conference 'considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...',

"[7] *Concerned about* differing interpretations of article II(2) of the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Desirous of* promoting uniform interpretation of the Convention in the light of the development of new communication technologies and of electronic commerce,

"[9] *Convinced* that uniformity in the interpretation of the term "agreement in writing" is necessary for enhancing certainty in international commercial transactions,

"[10] *Considering* that in interpreting the Convention regard is to be had to its international origin and to the need to promote uniformity in its application,

"[11] *Taking into account* subsequent international legal instruments, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce,

"[12] [*Recommends*] [*Declares*] that the definition of 'agreement in writing' contained in article II(2) of the Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]".

42. In view of the progress that had been made at the current session in connection with draft new article 7 of the UNCITRAL Model Law on Arbitration, the Working Group decided that it would be useful to re-examine the various options available to deal with difficulties that had arisen in the practical application of article II(2) of the New York Convention before considering the revised draft interpretative instrument. In that respect, the views within the Working Group were divided into essentially two propositions, as summarized below.

43. Strong support was expressed to the view that an interpretative instrument was not sufficient to deal with the practical problems and the existing disharmony in the application of article II(2) of the New York Convention and that the Working Group should focus on

the preparation of an amending protocol to the New York Convention. It was said that an interpretative instrument of the type being contemplated would have no binding legal effect in international law and was therefore unlikely to be followed by those charged with interpretation of the New York Convention. It was observed that the fact that an interpretative instrument of the type proposed would be non-binding made it questionable whether such an instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention.

44. It was further stated that the possible risk of disharmony that might result from the existence, at least for a certain period of time, of two groups of States parties to the New York Convention, namely those that adhered to the Convention in its original form only and those who, in addition, had adhered to the amending protocol, was not a convincing argument to discard the avenue of an amending protocol. In fact, it was said, disharmony already existed in the application of article II(2) of the New York Convention, and it would not be done away with by means of a non-binding interpretative instrument. An amending protocol to article II, and possibly article IV of the New York Convention, was needed if uniformity in the interpretation and application of the Convention was to be achieved.

45. Another argument in favour of an amending protocol underscored the distinction between modification of an existing text and clarification of its interpretation. It was said that it was not appropriate to use an interpretative instrument to declare that article II(2) of the Convention should be interpreted as having the meaning of article 7 of the Model Law in the wording being prepared by the Working Group. It was stated that the draft legislative provisions being considered by the Working Group differed significantly from article II(2) in that, for example, under the draft legislative provision an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II(2) of the New York Convention, as interpreted in many legal systems, it would not be so regarded. In that connection, some speakers expressed the view that reliance on the provision of article VII of the New York Convention, which allowed, in practice, for the application, in a Contracting State of the Convention, of more favourable provisions of its own laws or treaty obligations in support of an arbitration agreement or arbitral award was not an effective tool for ensuring uniformity in the respect of the application of the written-form requirement of article II(2) of the Convention.

46. The countervailing view, which also received strong support, was that formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation, because the adoption of such a protocol or amendment by a number of countries would take a significant number of years and in the interim create more uncertainty. For that reason, that approach was described by a number of delegations as essentially impractical. Given its evident success, shown by the unparalleled number of ratifications, the New York Convention could be rightly regarded as the foundation of international commercial arbitration, and that fact by itself demanded that utmost caution be used in considering any changes to its text. Caution was said to be even more important in view of the sovereign character of any diplomatic conference that might be called upon to consider any proposed amendments to the text, which would not be bound by the narrow scope of amendments currently under consideration by the Working Group. The expected positive result of enhancing certainty in the relatively narrow area of article II(2) of the New York Convention should be carefully weighed against the imponderable risk of having the entirety of the Convention re-opened for discussion

47. An additional problem impending upon the preparation of an amending protocol to the New York Convention, it was said, might be the risk of upsetting the liberal interpretation that article II(2) of the New York Convention already enjoyed in some jurisdictions. The view was expressed that starting work on a modification of the New York Convention might imply that the text could not be readily understood as allowing the interpretation that was essentially consistent with draft new article 7 of the UNCITRAL Model Law on Arbitration currently being formulated by the Working Group. A

clarification by way of an interpretative instrument, on the other hand, was said to constitute an appropriate recognition of the fact that there were differing possible interpretations of article II(2) of the New York Convention and that the Commission, which might be regarded as persuasive authority in many jurisdictions, could recommend a liberal interpretation of that text.

48. It was further pointed out that the difficulties attendant upon amendment of the New York Convention or the development of a protocol had been extensively considered at earlier sessions of the Working Group and that in view of those difficulties the Working Group had instead decided to focus on the preparation of an interpretative instrument.

49. The Working Group considered at length the various arguments that were put forward in support of both propositions. The Working Group acknowledged that it could not, at the present stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. In the meantime, the Working Group was agreed that it would be useful to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a "friendly bridge" between the new provisions and the New York Convention, pending a final decision by the Working Group on how to best deal with the application of article II(2) of the Convention.

50. While no objections were raised to that course of action, the view was expressed that the mere fact of attempting to address the matter in a guide to enactment of the new draft article 7 of the UNCITRAL Model Law on Arbitration appeared to prejudice the consideration of a possible amending protocol to the New York Convention. Raising issues related to the New York Convention in a guide to enactment, i.e., an ancillary text of questionable legal value, appended to a new provision of the Model Law, which itself was not a mandatory instrument, was said to be a counterproductive exercise. It was stated that it would be preferable not to attempt to address in any way the issues raised by the interpretation of the writing requirements under the New York Convention. The Working Group took note of those comments.

III. Interim measures of protection

51. The Working Group continued its work on draft article 17 of the UNCITRAL Model Law on Arbitration, which contained a definition of interim measures of protection and additional provisions on *ex parte* interim measures. The text considered by the Working Group was as follows:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary [in respect of the subject-matter of the dispute].
>
> "(2) The party requesting the interim measure should furnish proof that:
>
> > "(a) there is an urgent need for the measure applied for;
> > "(b) a significant degree of harm will result if the interim measure is not ordered; and
> > "(c) there is a likelihood of the applicant for the measure succeeding on the merits of the underlying case.

"(3) The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

"(4) An interim measure or protection is any temporary measure [, whether it is established in the form of an arbitral award or in another form,] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. For the purposes of this article reference to an interim measure includes:

"*Variant 1*

"(a) a measure to maintain the status quo pending determination of the questions at issue;
"(b) a measure providing a preliminary means of securing assets out of which an award may be satisfied; or
"(c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.

"*Variant 2*

"(a) a measure to avoid or minimize prejudice, loss or damage; or
"(b) a measure to facilitate later enforcement of an award.

"(5) The arbitral tribunal may, where it is necessary to ensure that an interim measure is effective, grant a measure [for a period not exceeding [...] days] [without notice to the party against whom the measure is directed] [before the party against whom the measure is directed has had an opportunity to respond] only where:

"(a) it is necessary to ensure that the measure is effective;
"(b) the applicant for the measure provides appropriate security in connection with the measure;
"(c) the applicant for the measure can demonstrate the urgent necessity of the measure; and
"(d) [the measure would be supported by a preponderance of considerations of fairness].

"[(6) The party to whom the measure under paragraph (5) is directed shall be given notice of the measure and an opportunity to be heard at the earliest practicable time.]

"(7) A measure granted under paragraph (5) may be extended or modified after the party to whom it is directed has been given notice and an opportunity to respond.

"[(8) An interim measure of protection may be modified or terminated [on the request of a party] if the circumstances referred to in paragraph (2) have changed after the issuance of the measure.]

"[(9) The party who requested the issuance of an interim measure of protection shall, from the time of the request onwards, inform the court promptly of any substantial change of circumstances referred to in paragraph (2).]"

Paragraph (1)

52. The Working Group considered a proposal for deleting the phrase in square brackets in the draft paragraph. That phrase was said to lend itself to a restrictive interpretation, for instance, if it were understood to mean that an arbitral tribunal could only order interim measures of protection that were directly related to the assets under dispute. In response to that proposal it was said that the phrase similar to the phrase in question had been used in

article 26 of the UNCITRAL Arbitration Rules and should be kept in draft article 17 for purposes of consistency. It was pointed out that, in the context of the UNCITRAL Arbitration Rules, that phrase was meant to be liberally interpreted and, in practice, had not posed an obstacle to the exercise by arbitral tribunals of their power to order interim measures of protection that were appropriate to any given case. Therefore, it was suggested that the phrase in square brackets in paragraph (1) should be retained.

53. Nevertheless, the prevailing view in the Working Group was that the phrase in square brackets should be deleted since it might lead to an undue restriction on the power of the arbitral tribunal to issue interim measures (e.g., in that it might be considered not to cover measures for freezing of assets that were strictly speaking not the subject-matter of the dispute).

54. The Working Group, however, stressed that the streamlining of paragraph (1) should not be understood as an indication that the current wording of article 17 of the UNCITRAL Model Law on Arbitration and article 26 of the UNCITRAL Arbitration Rules excluded measures that did not relate directly to the goods in dispute.

Paragraph (2)

55. General support was expressed in favour of the structure and contents of paragraph (2). Various comments and suggestions were made for improvement of the text. With respect to the opening words of the paragraph, a question was raised as to whether the paragraph should be phrased in terms of obligations binding on the party applying for the interim measure. As a possible alternative, it was suggested that the provision should be formulated as criteria to be applied by the arbitral tribunal when making a decision upon request for an interim measure. Another suggestion was to phrase the provision in more neutral terms, for example through a statement that an interim measure may only be granted if certain conditions were met. The Working group agreed that those various alternatives might need to be reconsidered at a future session. There was general agreement that the verb "should" should be replaced by a stricter formulation, such as "shall" or "must". As to the use of the words "furnish proof", it was observed that the provision should not interfere with the various standards of proof that might be applied in different jurisdictions or within the same jurisdiction. The view was also expressed that requiring "proof" might be excessively cumbersome in the context of interim measures. With a view to avoiding a reference to "proof", the words "establish", "demonstrate" or "show" were proposed as possible alternatives to the words "furnish proof".

56. With respect to subparagraph (b), it was widely felt that the provision should be based on a "balance of convenience" under which the assessment of the degree of harm suffered by the applicant if the interim measure was not granted should be balanced against an evaluation of the harm suffered by the party opposing the measure if that measure was granted. In addition, it was felt that the quantitative approach reflected in the words "a significant degree of harm" might create uncertainties as to how a degree of harm should be considered to be sufficiently "significant" to justify certain provisional measures. It was suggested that a reference to the more qualitative notion of "irreparable harm" should be used.

57. With respect to subparagraph (c), it was suggested that the words "substantial possibility" were preferable to the word "likelihood". At the close of the discussion, a question was raised as to whether provisional measures should be available in circumstances where a contradiction would exist between the requirements of subparagraphs (a), (b), and (c). A suggestion was made that, at a future session, the Working Group might need to reopen the debate as to whether those three subparagraphs should be made cumulative or alternative requirements.

58. After discussion, the Working Group decided that the following text should be considered by the Secretariat, together with other possible alternatives, when preparing a revised version of paragraph (2) for continuation of the discussion at a future session:

"(2) *Variant A*
The party requesting the interim measure must [show] [demonstrate] [prove] [establish] that:
Variant B
The arbitral tribunal shall only issue an interim measure if it is satisfied that:
Variant C
An interim measure may only be ordered if:

"(a) *Variant X*
there is [a] [an urgent] need for the measure applied for;
Variant Y
the interim measure applied for is necessary in the particular circumstances of the case;

"(b) irreparable harm to the applicant [will] [is likely to] result if the interim measure is not ordered and that harm substantially outweighs the harm, if any, that [would] [is likely to] result to the party opposing the interim measure if the measure were ordered; [and] [or]

"(c) there is a substantial possibility that the applicant for the measure will succeed on the merits of the [dispute] [underlying case]".

Paragraph (3)

"The arbitral tribunal may require"

59. The suggestion was made that the provision of some form of security in connection with interim measures should be made mandatory so as to offer adequate protection to the party against whom such interim measures might be enforced and to reduce the risk of abuse in the use of interim measures.

60. The prevailing view within the Working Group, however, was that, while the provision of security in connection with interim measures was the norm, it should not be made mandatory. It was pointed out, in that connection, that in some legal systems the question of whether or not security needed to be provided might not be for the arbitral tribunal to decide, but rather for the authority competent for the enforcement of the interim measure. It was also stated that, in practice, there might be situations where the party requesting the interim measure might not be in a position to readily offer appropriate security, for instance, where such party had been deprived of funds by the other party. From a policy perspective, it was felt that it would be preferable to keep the matter within the discretion of the arbitral tribunal.

61. A proposal to add, for purposes of clarity, words such as "if damage is likely to be sustained by the party against whom the measure is requested" at the end of the draft paragraph did not attract sufficient support, since the Working Group felt that the purpose for which security was required was not only to provide a safeguard in the event of damage resulting from the interim measure.

"any party"

62. Questions were raised as to the exact meaning of the words "any party" in the draft paragraph. Some speakers regarded those words as being vague and suggested that they

should be replaced with a more precise formulation, such as "the applicant for the interim measure". The Working Group, however, was not in favour of replacing those words with another phrase. It was felt that the words "any party" afforded the desirable degree of flexibility to encompass, for example, the submission of alternative guarantees by the party against whom the measure was requested in order to avoid the interim measure being ordered.

63. Subject to linguistic changes to ensure consistency among the language versions, the Working Group therefore adopted the substance of the draft paragraph. It was suggested that the above discussion should be reflected in the guide to enactment of the model legislative provision.

Paragraph (4)

64. As a general comment, it was suggested that, to the extent that draft paragraph (4) defined the scope of interim measures, it should be placed immediately after draft paragraph (1). That suggestion was adopted by the Working Group.

"[, whether it is established in the form of an arbitral award or in another form,]"

65. The Working Group began its substantive discussion of the draft paragraph by considering a proposal to delete the entire phrase within square brackets in the *chapeau* of the draft paragraph. In support of that proposal it was said that the phrase in question was not needed since the possible spectrum of interim measures mentioned therein was already covered by the words "any temporary measure". The Working Group did not follow that proposal, however, since it was of the view that the phrase in question substantially added to the draft paragraph by clarifying that, depending on the circumstances and on the jurisdiction, interim measures might be issued in a variety of forms. The Working Group proceeded to consider proposed amendments to that phrase.

66. One suggestion was that the words "arbitral award" should be replaced by the words "partial or interim award". In support to that proposal it was stated that the words "arbitral award" were often understood as referring to the final award in the arbitration proceedings, whereas an order of interim measures, even if issued in the form of an award, was typically an interlocutory decision. Some support was expressed for that proposal, although most speakers objected to the use of the words "partial award", since those words typically referred to a final award that disposed of part of the dispute, but would not appropriately describe an interim measures. Doubts were expressed as to whether the words "interlocutory award" would adequately cover the various types of interim measures that might be issued in the form of an award. After discussion, the preference within the Working Group was for simply deleting the word "arbitral" without further qualifying the nature of the award.

67. Another proposal was to delete the words "or in another form" after the word " award". Such deletion was justified, it was said, in the interest of ensuring due process and the orderly conduct of the arbitral proceedings. As currently drafted, the provision contemplated the issuance of interim measures in a form other than a formal award. That situation was said to be problematic since in some legal systems only formal awards and not every procedural order or decision of an arbitral tribunal was subject to judicial review in the course of setting-aside or enforcement procedures. If the provision allowed the issuance of interim measures by means other than a formal award, the party against whom the interim measure was requested might be deprived of the rights it might otherwise have under the applicable law, for instance, to challenge the validity or enforceability of the arbitral award. That, it was said, was the reason why some of the jurisdictions that had enacted the UNCITRAL Model Law on Arbitration had expressly provided that an order of interim measures had to be issued as a formal award.

68. The prevailing view within the Working Group, however, was not in favour of deleting the words "or in another form". It was said that it would be undesirable for the draft paragraph to be overly prescriptive in respect of the form that an interim measure had to take. The fact that the draft paragraph did not require the order of interim measures to be issued as a formal award, it was said, could not be regarded as diminishing any recourse or other legal means available to the party against whom such measure was ordered. It was pointed out, in that connection, that the question of whether an order of interim measures constituted an "award" for the purposes of setting-aside or enforcement rules of the forum State was not predicated upon the title or form given to the order by the arbitral tribunal. That question was settled by applicable domestic law. The draft model legislative provision, it was stated, should not interfere with any power that the competent court might have to qualify such an order as an award despite the form or title given to it by the arbitral tribunal. In that connection, it was pointed out that the question as to whether an interim measure, whether or not qualified as an "award", was subject to setting aside under article 34 of the UNCITRAL Model Law on Arbitration might need to be further considered in the context of future discussions on enforcement of interim measures.

"pending the issuance of the award"

69. In view of the fact that interim measures might be requested or issued at different stages of arbitral proceedings, it was suggested that the words "pending issuance of the award" should be replaced by words such as "at any time prior to the issuance of the award". The Working Group accepted that suggestion.

Variants 1 and 2

70. As a general comment it was said that, since the lists of measures contained in both variants could only be of an illustrative and non-exhaustive nature, it would be preferable to present them in the guide to enactment, rather than in the body of the provision. The Working Group was invited to consider, in that connection, whether variants 1 and 2 were indeed mutually exclusive or whether they could not be usefully merged into a single list.

71. The Working Group was of the view, however, that it would be useful for the draft paragraph to list, albeit in a non-exhaustive fashion, types of measures that might be ordered by an arbitral tribunal, rather than simply offering such illustration in the relevant portion of the guide to enactment. The Working group agreed that the opening words of paragraph (4) should make it abundantly clear that the list of provisional measures provided in the various subparagraphs was intended to be non-exhaustive.

72. In that connection, although support was expressed in favour of the more general formulation of Variant 2, the preference of the Working Group was generally for the more descriptive approach followed under Variant 1.

Subparagraph (a)

73. While general support was expressed for the substance of the subparagraph, it was felt that the purpose of the provisional measure might be not only to maintain but also to restore the status quo. It was agreed that subparagraph (a) should be redrafted accordingly.

Subparagraph (b)

74. It was widely agreed that subparagraph (b) should be reformulated along the following lines "a measure providing a preliminary means of securing or facilitating the enforcement of the award".

Subparagraph (c)

75. It was generally felt that the ambit of the provision should be broadened to cover also cases where the purpose of the interim measure was not to restrain but to order affirmative conduct. Along the same lines, it was felt that the scope of the provision should not cover only measures ordered against the defendant but also measures addressed to other parties. The Working Group agreed that subparagraph (c) should read along the following lines: "a measure to restrain or order conduct of any party to prevent current or imminent future harm".

Proposed new subparagraph (d)

76. With a view to facilitating the issuance of interim measures aimed at preventing destruction of evidence, it was suggested that among the illustrative list contained in paragraph (4), mention should be made of "a measure intended to provide a preliminary means of preserving evidence". That suggestion was accepted by the Working Group.

Paragraph (5)

77. Diverging views were expressed as to whether, as a matter of general policy, it would be suitable for a revision of the UNCITRAL Model Law on Arbitration to establish the possibility for interim measures to be ordered *ex parte* by an arbitral tribunal. Under one view, in line with existing arbitration laws in a number of countries, the possibility of ordering an interim measure of protection on an *ex parte* basis should be reserved only to courts of justice. It was stated that no exception should be made to the principle that each party should have equal access to the arbitral tribunal and a full opportunity of presenting its case, as expressed in article 18 of the Model Law. Recognizing the possibility that *ex parte* measures might be ordered by the arbitral tribunal was said to open an avenue for dilatory and unfair practices that should be avoided. It was also said that *ex parte* interim measures could have a damaging effect on third parties. However, the contrary view was widely expressed that the same principles that parties should be treated with equality and be given a full opportunity of presenting their case generally applied to courts of justice and in many countries were not regarded as sufficient grounds for refusing the possibility of ordering *ex parte* measures in exceptional circumstances. The prevailing view was that introducing a provision dealing with such *ex parte* interim measures into the Model Law would constitute a useful addition to the text and meet the needs of arbitration practice.

78. Various suggestions were made with a view to limiting the occurrence of possibly abusive applications for *ex parte* interim measures. One suggestion, inspired by rules applied by the International Centre for Settlement of Investment Disputes (ICSID), was that the authority of the arbitral tribunal to grant interim measures *ex parte* should be made contingent on a previous agreement being concluded to that effect by the parties. It was pointed out in response that, in the more general context of commercial arbitration, it was unrealistic to imagine that parties would agree on such a procedural rule either before of after the dispute had arisen. Another proposal was that only provisional measures intended to maintain the status quo pending determination of the question at issue could be ordered *ex parte* by the arbitral tribunal. That proposal was objected to on the grounds that it would not cover the situation where the interim measure was aimed at restoring a situation altered by the aggressive action of a party. Yet another proposal was that *ex parte* interim measures should only be regarded as acceptable where circumstances made it impossible to notify the other party. A further proposal, which attracted support from a number of delegations, was that the revised text of article 17 of the Model Law should establish an obligation for any party who sought an *ex parte* interim measure to inform the arbitral tribunal of all circumstances, including circumstances adverse to its position, that the arbitral tribunal was likely to find relevant and material to its determination whether the requirements of paragraph (5) had been met. Such an obligation was referred to as "full and frank disclosure", and described as already known to certain legal systems. Doubts

were expressed, however, by delegations familiar with other legal systems as to whether the proposed obligation would be entirely covered by the more widely known concept of "good faith". Concerns were raised regarding the acceptability of such an obligation if it resulted in requiring a party to act positively against its own interests. Questions were also raised regarding the exact contents of the obligation and regarding the consequences that might flow from failure by the applicant to comply. It was suggested that further research might be needed as to such consequences, which might include revocation of the interim measure or damages if the interim measure had been improperly procured.

79. Also with a view to limiting the possibly negative impact of ex parte interim measures, another suggested approach was to limit or exclude the possibility of court enforcement of *ex parte* interim measures. Support was expressed in favour of exploring the ways in which the court enforcement of an interim measure initially ordered *ex parte* could be made subordinate to its later confirmation *inter partes* by the arbitral tribunal. Support was also expressed in favour of establishing the *ex parte* nature of a provisional measure as a possible ground for refusing enforcement. Doubts were expressed, however, as to whether interim measures ordered *ex parte* by an arbitral tribunal would still present any attractiveness to practitioners if the revised text of the Model Law made them unenforceable. In that connection, it was pointed out that in certain countries where the court system would experience difficulties in reacting expeditiously to a request for an *ex parte* interim measure, it would be essential to establish the enforceable character of such an interim measure when ordered by an arbitral tribunal. The Working Group did not come to a conclusion regarding the enforcement of *ex parte* interim measures. It was agreed that the issue would need to be considered further in the context of the general discussion regarding enforcement of interim measures.

Chapeau of draft paragraph (5)

80. Turning its attention to the specific formulation of paragraph (5), the Working Group, discussed the definition of *ex parte* interim measures in the *chapeau* of draft paragraph (5). A suggestion was made that the *chapeau* of draft paragraph (5) should be prefaced with the words "In exceptional circumstances". While the view was generally shared that *ex parte* interim measures should only be considered in exceptionally urgent circumstances, doubts were expressed as to whether the inclusion of the suggested words in the draft provision would be sufficiently clear to provide an objective criterion. As a matter of drafting, it was pointed out that the words "where it is necessary to ensure that an interim measure is effective" were redundant with subparagraph (a) and should be deleted.

81. With respect to the words "[for a period not exceeding [...] days]", the view was expressed that the matter of time-limitation of the measure should be left to the discretion of the arbitral tribunal. Another view was that the issue of time limitation would be more appropriately dealt with in the context of a limitation of the time set forth to notify the defendant of the interim measure under draft paragraph (6). The prevailing view was that the duration of any *ex parte* interim measure should be limited and that the words should be retained. It was suggested that the limitation on the duration of an interim measure of protection granted under paragraph (5) should not affect the authority under paragraph (2) of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection after the party against whom the measure was directed had been given notice and an opportunity to respond.

82. With respect to the alternative wordings between square brackets ([without notice to the party against whom the measure is directed] [before the party against whom the measure is directed has had an opportunity to respond]), some preference was expressed for the more descriptive wording along lines of: "before the party against whom the measure is directed has had an opportunity to respond". The view was expressed that the two wordings might be combined to reflect the situation where the applicant was unable to give notice to the respondent, for example where the respondent could not be located on time, as

distinct from the situation where the applicant chose not to give notice to the respondent so as not to undermine the effectiveness of the interim measure, for example where the respondent could be expected to transfer assets out of the jurisdiction.

83. As to the requirements that should be met for an interim measure to be granted *ex parte*, it was generally agreed that interim measures considered under draft paragraph (5) should at least meet all the prerequisites for the issuance of an interim measure set forth under draft paragraph (2).

Subparagraph (a)

84. The substance of subparagraph (a) was found generally acceptable. The view was expressed, however, that the notion that the measure should be "effective" was insufficiently precise. It was suggested to use the words "in order to ensure that the execution of the order is not frustrated".

Subparagraph (b)

85. The production by the applicant of appropriate security in connection with the interim measure was regarded by a number of delegations as essential to avoid abusive applications for *ex parte* interim measures. Doubts were expressed, however, as to whether the existence of such security should be made a mandatory pre-requisite for the issuance of an *ex parte* interim measure or whether the issue should be left to the discretion of the arbitral tribunal.

Subparagraph (c)

86. While the view was expressed that the reference to the urgent necessity of the measure should be the determining factor for envisaging the issuance of an *ex parte* interim measure, concern was expressed regarding the possible redundancy of subparagraph (c) of draft paragraph (5) with subparagraph (a) of draft paragraph (2). To the extent that urgency would be retained as a general criterion under draft paragraph (2), it should be deleted from draft paragraph (5), unless it could be qualified so as to provide a distinct criterion in the context of *ex parte* interim measures.

Subparagraph (d)

87. In view of its earlier deliberations regarding draft paragraph (2), the Working Group agreed that subparagraph (d) was not needed and should be deleted.

88. With a view to reflecting some of the above-mentioned views and concerns, various suggestions were made for simplifying the text of draft paragraph (5). One suggestion read as follows: "Upon receipt of a request to issue an interim measure, the arbitral tribunal shall have the power to take any measure as it deems necessary in order to assure the effectiveness of the interim measure in case it is granted". Another proposal read as follows: "The arbitral tribunal may, where the requirements of paragraph (2) are met and where it is necessary to ensure that an interim measure is effective, grant a measure before the party against whom the measure is directed has had an opportunity to respond". Yet another proposal was made for a redraft of paragraph (5) and the remainder of draft article 17 as follows:

> "Para (5)
>
> "[In exceptional circumstances,] the arbitral tribunal may grant an interim measure of protection for a period not exceeding [... days], without notice to the party against whom the measure is directed or before the party against whom the measure is directed has had an opportunity to respond, where:

"(a) the requirements of paragraph (2) are met; and
"(b) the arbitral tribunal determines [, and so states in a written finding,] that it is necessary to proceed in such manner in order to ensure that the measure is effective.

"New Para (6)

"A party who seeks an interim measure of protection under paragraph (5) shall have an obligation to inform the arbitral tribunal of all circumstances, including circumstances adverse to its position, that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of that paragraph have been met.

"At the beginning of present paragraph (6), to be renumbered, add the following text

"Unless the arbitral tribunal makes a determination under paragraph (5)(b) that it is necessary to proceed without notice to the party against whom the measure is directed in order to ensure that the measure is effective, that party shall.

"Reformulation of present paragraph (7), to be renumbered --

"The limitation on the duration of an interim measure of protection granted under paragraph (5) shall not affect the authority under paragraph (2) of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection after the party against whom the measure is directed has been given notice and an opportunity to respond.

"Present paragraph (3) should be placed here if the consensus is to make the order of security discretionary in all cases, whether ex parte or not.

"Reformulation of present paragraph (8), to be renumbered

"The arbitral tribunal may modify or terminate an interim measure of protection at any time in light of additional information or a change of circumstances.

"Reformulation of present paragraph (9), to be renumbered

"Delete "court" *and substitute* "arbitral tribunal"
"Add "in these circumstances" *after* "substantial change"
"Delete "referred to in paragraph (2) *and substitute* "on the basis on which the application sought or the arbitral tribunal granted the interim measure of protection.

"Proposal on Enforcement

"A court before which recognition or enforcement of an award or order of an interim measure of protection issued under article 17(5) is sought [shall not] [need not] refuse recognition or enforcement on the grounds set forth in article 36(1)(a)(ii) if the court determines that it is necessary to proceed without notice to the party against whom the measure is directed in order to ensure that the measure is effective".

89. Some support was expressed in favour of the three proposals. The discussion focused on the suggested revision of paragraph (5) and the suggested wording for a new

paragraph (6) in the latter proposal. For lack of sufficient time, the Working Group did not consider the remainder of that proposal.

90. With respect to the words: [, and so states in a written finding], doubts were expressed as to whether the proposed text was intended simply to refer to the fact that the decision of the arbitral tribunal should be reasoned (in which case the additional wording was probably superfluous), or whether it would result in the obligation for the arbitral tribunal to express in an additional writing the reasons for which it found it necessary to proceed *ex parte* (in which case the obligation could be regarded as excessively burdensome). It was stated in response that it was essential to ensure that explanations in writing would be produced by the arbitral tribunal and specifically address the reasons for which it considered it necessary to proceed *ex parte*.

91. The view was expressed that a limit should be stated regarding the duration of a provisional measure ordered *ex parte*. While it was widely realized that it might be difficult to achieve consensus as to a precise duration, it was suggested that including words along the lines of "for a limited period of time" to be determined by the arbitral tribunal might sufficiently cover the point. Another view that attracted support was that in the case of *ex parte* interim measures, the provision of appropriate security by the applicant should be mandatory, particularly since a question might arise as to whether any claim for damages that could result from harm caused to the respondent as a result of the *ex parte* interim measure would constitute a new claim or fall within the scope of the arbitration. It was suggested that that question would need to be answered in the context of the revision of the Model Law.

92. A suggestion was made to reverse the order of new subparagraphs (a) and (b).

93. With respect to suggested new paragraph (6), a suggestion was made that the words "including circumstances adverse to its position" should be deleted. Another suggestion was that wording along the lines of "all circumstances of which the party who seeks the interim measure was or should have been aware" should be used. It was pointed out that such wording might avoid the ambiguities and uncertainties that might be associated with the words, "circumstances [...] that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of that paragraph have been met".

94. The Working Group did not come to a conclusion on the issue of paragraph (5). The Secretariat was requested to prepare a revised draft, with possible variants, to reflect the various views, concerns and proposals expressed at the current session.

Notes

1. *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

2. Ibid., paras. 340-343.

3. Ibid., paras. 344-350.

4. Ibid., paras. 371-373.

5. Ibid., paras. 374 and 375.

6. Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

7. Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-315.